EVOLUTION OF LEGAL REMEDIES AS A SUBSTITUTE FOR VIOLENCE AND STRIKES

An historical argument leading up to the settlement of industrial disputes by judicial remedies, arbitrable tribunals and industrial commissions.

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Industrial and International Justice Still in a Primitive Stage

A barbarian may be supposed to be blissfully unconscious of his own barbarity. We regard ourselves as the product of a highly civilized age, yet we take complacently, and almost as a matter of course, many relics of barbarism, notably, public war and war preparations as a method of compelling respect for international rights, and private war and strikes as a method of asserting economic rights. Only a few centuries ago, our barbarous ancestors in England and on the continent of Europe employed private war as a normal method of settling all serious individual wrongs. The slow process of substituting law in place of force and violence, which may be traced in the ancient history of Greece and Rome, and which occured doubtless in still older civilizations, repeated itself almost independently in England, showing that some of the most ancient history may be found in comparatively modern times.

It may prove instructive to trace the gradual evolution of judicial and extra-judicial remedies in a broad and rapid manner, as showing that the only hope of permanent peace is a complete administration of justice by judicial remedies. There is a most interesting analogy here in the legal relations between the various nations and the legal relations between labor and capital. International peace can only be established by a world reorganization for international justice in courts; and industrial peace can only be firmly established by industrial tribunals for the impartial and speedy settlement of labor disputes and the furnishing of adequate remedies for industrial wrongs, individual and collective. This argument would aim to prove that our economic system will have

to provide for economic justice, or pay in violence and bloodshed for injustice.

THE BLOOD-FEUD

In the tenth and eleventh centuries, Englishmen lived mostly without law. In those lawless days, the state could furnish little protection to the individual, and on account of his personal insecurity, a man dared not separate from his kin and stand alone. The blood-feud, or vendetta, gave protection by ensuring speedy vengeance for injury. It is the state of enmity that results between the kindred or *maegth* of a man who suffers injury and that of the injurer. The family or kin ("maegth") is often called the "blood-feud group." In Tacitus, we find that every man was bound to take up the enmities as well as the friendships of his father or kinsman. But already in Tacitus, as in the Anglo-Saxon laws, we find that injuries may be appeased by compositions of cattle or money.[1]

COMPOSITIONS

The system of compositions and wergelds is thus an outgrowth of the blood-feud. The kindred of the slain must demand payment of the *wer* or prosecute the feud. The *healsfang* or first installment of the wergeld was the symbol and price of the restoration of peace. In Alfred's day, it became unlawful to begin a feud till an attempt had been made to exact the established price as amends.

At the end of the Anglo-Saxon period, homicide and other offences had to be settled by compositions, if possible, except that killing was lawful and justifiable in the case of a thief caught in the act, and carrying away the stolen goods, or of an adulterer or outlaw.[2]

LIMITATIONS ON FEUD

When a murder had been committed, the kindred of the accused might first swear him free, if he were innocent. If they were unable to do this and unwilling to pay the wergeld, they had to bear the feud. The Anglo-Saxon feud went on until a number of "murderers or their nearest kindred, head for head" were killed equal

[1] Essays in *Anglo-Saxon Law*, p. 141; Pollock and Maitland, *English Law*, Vol. 1, p. 46.

[2] Pollock and Maitland, *English Law*, Vol. 1, p. 31, 47; Essays in *Anglo-Saxon Law*, p. 144; Holdsworth, *History of English Law*, p. 28, 34, 41.

in value to the "man-worth" of the murdered man. Six ceorls must die for one thegn. The feud was thus strictly limited in time and number, and did not (as is said to be the case in Kentucky) go on for years till whole families became extinct.[3]

GROWTH OF PUBLIC ADMINISTRATION OF JUSTICE

Slowly but steadily, the developing state wrests these rights of police and blood-feud from the hands of the *maegth*. The state gradually assumes the public functions of protection and punishment. Though self-help, private redress, is tolerated by the Anglo-Saxon kings, it is limited as far as possible. The king is everywhere engaged in enforcing composition. The blood-feud is moderated by the system of "bots" to the injured and "wite" to the king for infractions of his "peace." Private vengeance is restrained until public tribunals have passed judgment, and then if composition is refused, the kinsmen are the executioners. Finally the system of private vengeance and reprisals, which the Saxon kings were forced to tolerate, succumbs to the firm hand of the Norman rulers. The king's peace covers all; the public administration of justice supplants self-help and recourse to courts supersedes the recourse to physical force, which is the instinctive method of redressing wrongs.[4]

SURVIVALS OF SELF-HELP

In many cases, we recognize that it is legitimate to exert leverage and extort justice by withholding that which chance, strength, foresight or strategy has put in our possession. If a man owes you money, and funds of his come into your hands, you will probably retain what he owes you rather than trust him to voluntarily pay you what is due. Liens, or the right of detaining property of the debtor already in the hands of the creditor for services rendered thereon, are favored by the law. If you do not have funds of his already can you seize his money or cattle for yourself and keep them until he is compelled to do justice? Distress, or this power of seizing a man's property extra-judicially in satisfaction of a demand, occupied a prominent place in early remedial law and is very ancient among all peoples. But for a man to be judge and executive officer in his own behalf is not to be endured. Distress

[3] Essays in *Anglo-Saxon Law*, p. 145, 147.

[4] Pollock and Maitland, *English Law*, p. 45; Howard's *King's Peace*, p. 7.

is soon overloaded with formalities and confined to a few claims of great urgency. Until recently, however, a landlord, without suit or adjudication, could enter his tenant's premises, seize his belongings, and hold and sell them for the rent, but this harsh and oppressive remedy has practically become extirpated or transformed into the judicial process of attachment or execution. The extra-judicial has developed into the judicial distress. A court must authorize the taking and send an officer to do it.

Self-defense, the defense of possession, the recaption of chattels, reëntry on land in the adverse possession of another, the abatement of nuisances, are the principal examples of extra-judicial remedies still permitted by the law under certain conditions, if employed without breach of the peace or unnecessary violence. A man may not kill or wound, however, merely in defense of his property.

STRIKES, LOCKOUTS AND BOYCOTTS

Labor and capital are still largely left to settle their controversies by primitive methods of self-help, such as strikes, boycotts and lockouts, under certain limitations imposed by law as in other extra-judicial remedies. Just what these limitations shall be, is a matter of bitter dispute and litigation. These remedies are difficult to control and go largely on the basis of brute force instead of reason. They are still the ultimate appeal, in spite of their disastrous consequences to the public and to all concerned. Working men have been largely left to extort such economic justice as they could by withholding their labor, using this negative weapon against the weapon of starvation and lockout in the hands of the employer.

SMALL LEGAL RECOGNITION OF ECONOMIC RIGHTS

Labor has been aided to some extent in recent years by legislation as to employer's liability and as to hours and conditions of labor, but the enforcement of such laws has been very inadequate. It is only in legislation, in the public regulations of the statute book, not in the common law, that the economic and social responsibility of capitalists and employers finds expression. The courts, in formulating common law, have not recognized the sphere of economic rights. They have not undertaken the duty of asserting social and collective interests or building up a just social or

economic system. The rights of property, as worked out by common law, are thus individualistic, not social or communal. The complex mechanism of capital and labor is the result of the play of unregulated individualism and self-help in the acquisition of private property. In New Zealand, Australia, Canada and in some of the European countries, some progress is being made in arbitration and industrial courts have been established which attempt to reconcile the conflicting interests of capital and labor on a basis of economic justice.

SELF-PRESERVATION

Where a working man is oppressed, when his legal and economic rights are denied and trampled under foot, he is placed face to face with the practical question "What to do?" Through cowardice, ignorance, or weakness, shall he endure the wrong? Shall he let his rights go trampled under foot by the employer unpunished? Or shall he struggle and obtain better living conditions for himself, and his family, as best he may? The preservation of existence is the deepest instinct of every creature, and to tolerate injustice, as Von Ihering points out in his *Struggle for Law*, is ultimately to forfeit existence. In the beginning, bloodshed and violence were necessary to redress wrongs, and the only security for person, property, or family, was to let other men know that they could not invade any of these rights without attack. Violence seems still the ultimate remedy of working men so long as we have gross inequalities before the law.

PRIMARY DUTY OF GOVERNMENT

The state cannot expect individuals to refrain from the natural and instinctive exercise of private force for self-preservation and the redress of injuries, unless it supplies means to maintain their just rights and also of bringing wrongdoers to punishment. Unless the administration of justice insures a reasonable degree of popular satisfaction and acquiescence, the private justice of mob lynchings, family feuds, the custom of carrying knives and revolvers, violent strikes, syndicalism and sabotage and other manifestations of violence will ensue, which threaten the entire social system. Mankind universally approve of violence which is used to avenge and beat off injustice, if there be no other remedy. Without public justice, superior in power to all offenders, there can be no peace, safety,

sense of security, or mutual intercourse. To establish justice, to secure individuals and society in the enjoyment of their rights, is, next to external defense, the great duty of governments and the principal reason why they are instituted among men.

GROWTH OF ADMINISTRATION OF JUSTICE

The progress of society to a complete administration of justice has been slow and gradual, and it must probably continue to be so in the economic field. The principal stages in the establishment of judicial tribunals as a substitute for violence, self-help and private vengeance, seem to be, first, the furnishing of opportunity for voluntary acceptance and choice of peaceable arbitration, as in international relations, and later, the making of submission of disputes to arbitration more and more compulsory. Naturally, the earliest wrongs to call for remedy, were the so-called trespasses, such as assault and battery, false imprisonment, and the seizing and carrying away of goods from another's possession. Later, remedies are extended for less tangible wrongs, such as defamation, slander and libel, and the non-performance of contracts. It comes to be recognized that it is the king's duty and function to provide some sort of remedy in his courts for every substantial wrong or grievance.

UBI JUS, IBI REMEDIUM

The most vital principle in the growth of law is that represented by the maxim *Ubi jus, ibi remedium.* That is, that a remedy must be given for the violation of every right, or, in other words, that every injury must have redress. As Chief Justice Holt said in the famous case of Ashby against White[5] where an election officer was sued for his refusal to permit a voter to vote, "It were a vain thing to imagine that there should be a right without a remedy, for want of right and want of remedy are convertibles." As was said by Chief Justice Marshall, in the great case of Marbury against Madison, 1 Cranch, 163, "The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

[5] Lord Raymond 938, 1 Smith Leading Cases, 342, 1 English Ruling Cases, 521.

A NEW PROVINCE FOR LAW

These labor controversies involve the interest of all the people in addition to the interest of the opposed forces of employes and employers. Has not the time now come for the recognition of a new province for law and a new set of remedies, and the substitution of the peaceful methods of arbitrations and commissions in place of the violent redress of economic injuries? It is no doubt true that strikes cannot be entirely done away, and that a large measure of self-help must still be recognized in connection with industrial bargaining. But legal remedies must also be provided, at first largely of an optional nature.

Under such a system, it may be justly demanded by public opinion that employers and employes alike shall submit their wrongs and complaints to public tribunals and abide by their decrees. The intervention of an impartial tribunal will require the rational investigation and patient inquiry into the facts of the case. It will afford opportunity for thorough argumentation and calm weighing of the principles of right and justice to be applied. It represents the civilized appeal to reason, instead of the barbarous recourse to arms.[6]

The public now stands aside and lets the parties to an industrial dispute fight it out according to the rules of the game. The state has neglected its duty to provide other means than strikes and self-help for settling these disputes. As Blackstone says in his Commentaries:[7]

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna charta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke), is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam* (to none will we sell, to none deny, to none delay either right or justice): "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona* (either in his goods, lands, or person), by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for

[6] H. B. Higgins, "A New Province for Law and Order," 29 *Harvard Law Review*, 13.

[7] Book 1, p. 141.

the injury done to him, freely without sale, fully without any denial, and speedily without delay."

In nearly all the states, the constitution declares that every person ought to have a certain remedy at law for all injuries to the person, property, or character; and to obtain justice freely without being obliged to purchase it, completely and without denial, promptly and without delay.[8]

The right to strike is, under our present industrial system, a necessary safeguard and remedy. It is as vain to hope for the total elimination of strikes or lockouts, as for the total elimination of the necessity of self-defense and other forms of self-help. But this hostile, dangerous and wasteful method of enforcing demands ought to be used only as a last resort. If so, some earlier resort must be provided. Society is under an obligation to provide some alternative to this trial by battle, and to make some remedies available for the civilized appeal to reason, instead of the primitive recourse to arms. The aim should not be to prevent strikes at all hazards, but to supply some prompt, competent and impartial tribunal whose decision will ordinarily make them unnecessary, and which will make the public a party to the collective bargaining process.

As Blackstone points out,[9] "Judicial and extra-judicial remedies are always concurrent where the law allows an extra judicial remedy."

Therefore, though I may defend myself or my relations from external violence, I am yet afterwards entitled to an action of assault and battery; though I may retake my goods, if I have a fair and possible opportunity, this power of recaption does not debar me from my action of trover and detinue. I may either enter on the lands on which I have a right to enter, or may demand possession by real action; I may either abate a nuisance by my own authority, or call upon the law to do it for me; I may detain for rent, or have an action of debt at my own option.

The extra-judicial remedy is exceptional. The judicial remedy must be granted wherever a right is invaded.

It is not suggested that there should be an exact likeness between our law courts and commissions or boards for industrial matters. It is true that some industrial and economic rights are capable of definition and judicial enforcement, as, for example, workmen's compensation. One measure imperatively demanded is genuine enforcement of the laws which we now have and the effective recognition of all rights, legal and constitutional.

[8] Stimson, *Federal and State Statutes*, Section 70.

[9] Book 3, p. 21.

But many of the most serious questions which arise relate to continuing future relations between more or less indefinite parties and under various and changing conditions. Mediation and conciliation leading to a just agreement between the parties would seem to be ordinarily the principal remedy, as pointed out by Professor James H. Brewster in an article in a recent number of the *Michigan Law Review*, entitled, "The Comparison of Some Methods of Concilation and Arbitration of Industrial Disputes."[10]

As Professor Brewster points out, under the so-called Erdman-Newman act, mediation and conciliation have proved more advantageous and have been more often resorted to than arbitration. This is not a compulsory arbitration law. So under the Canadian Industrial Disputes Investigation Act, the first object is conciliation, and when arbitration is brought about, public opinion is the sole compelling force. Under the Canadian Act, investigation with a view to amicable settlement of the dispute is the duty of the board. In fact, this investigation is compulsory, and while it is pending there is no suspension of the work. Investigation precedes the strikes or lockouts, instead of following it. Publicity follows investigation, and then, as a last resort, the parties may exercise their rights of strike, lockout, etc. This procedure affords an opportunity of justly determining disputes by reason, rather than by force alone. The chief purpose is to provide means of investigation, discussion, conciliation and publicity and the settlements are in the form of agreements.

Compulsory arbitration, at the present time, seems impracticable and undesirable. Recent amendments of the Compulsory Arbitration Law of New Zealand emphasize its conciliatory and voluntary features. At the present time, our employers frequently refuse even to negotiate with the workers and claim an absolute right to run their business in their own way, and with reference only to their own interests. Where the parties refuse either to bargain or to arbitrate, compulsory official investigation at the instance of one of the parties or of a public official, when public interest demands it, will afford opportunity for getting at the truth and for placing the influence of the public on the side of justice.

In this new system of courts or commissions, the object of the trials will be administrative inquiry and ascertainment of the truth,

[10] *Michigan Law Review*, Vol. 13, p. 185.

rather than the mere preserving of the peace, by furnishing a modern form of trial by combat, conducted by highly paid legal champions. The remedy of the workers for their grievances will no longer lie exclusively in strikes, attended almost inevitably by force and violence, and the law will no longer content itself with attempting to confine labor and capital to "peaceable hostilities" in the fixing of wages, hours and working conditions on railroads and in other industries on which the public is dependent.